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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION**

11 STEPHENSON AWAH TENENG,
MARCEL NGWA, ANKUSH
12 KUMAR, GURJINDER SINGH,
ATINDER PAUL SINGH, NOE
13 MAURICIO GRANADOS AQUINO,
and all others similarly situated,
14

15 Plaintiffs,

16 v.
17 DONALD J. TRUMP, President of the
United States,
18 KIRSTJEN NIELSEN, Secretary
Department of Homeland Security;
RONALD D. VITIELLO, Acting
Director, Immigration and Customs
Enforcement;
DAVID MARIN, Field Office Director,
Los Angeles Field Office of
Immigration and Customs Enforcement;
JEFFERSON BEAUREGARD
SESSIONS, III, U.S. Attorney General;
HUGH J. HURWITZ, Acting Director,
Federal Bureau of Prisons,
DAVID SHINN, Warden, FCI
Victorville Medium Security Prison I/II,
in their official capacities only,
25

Defendants

Case No. 5:18-CV-01609

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES**

ORAL ARGUMENT REQUESTED

DATE: October 15, 2018
TIME: 9:00 AM
JUDGE: Hon. Jesus G. Bernal
CRTRM: 1

5:18-CV-01609

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themselves and others similarly situated
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NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD HEREIN:

NOTICE IS HEREBY GIVEN that on October 15, 2018 at 9:00 AM or as soon thereafter as the matter may be heard by the above Court, located at Riverside, California, Plaintiffs Stephenson Awah Teneng, Marcel Ngwa, Ankush Kumar, Gurjinder Singh, Atinder Paul Singh, and Noe Mauricio Granados Aquino, on behalf of themselves and all others similarly situated, move this Court to grant a class-wide preliminary injunction¹ enjoining Defendants from:

- (a) providing constitutionally inadequate health care to ICE detainees at FCI Victorville;
- (b) subjecting ICE detainees at FCI Victorville to conditions and practices that amount to punishment; and
- (c) transferring any additional ICE detainees to FCI Victorville.

On behalf of themselves and all others similarly situated, Plaintiffs Ngwa, Gujinder Singh, Atinder Paul Singh, and Noe Mauricio Granados Aquino additionally move this Court to grant a subclass-wide preliminary injunction, enjoining Defendants from:

- (a) restricting detainees' religious exercise or failing to accommodate detainees' religious exercise in a manner that violates or is otherwise inconsistent with ICE's Detention Standards; and
- (b) transferring any additional ICE detainees who are religious to FCI Victorville.

This Motion is based on this Notice of Motion, the accompanying

¹ Pursuant to Local Rule 7-3, Plaintiffs' counsel conferred with counsel for the Defendants regarding this motion on September 5, 2018. See Doc. 42-1 ¶¶ 2-3.

1 Memorandum of Points and Authorities, the supporting declarations, all pleadings
2 and papers filed in this action, and such additional papers and arguments as may be
3 presented at or in connection with the hearing.

4
5 DATED: September 11, 2018 Respectfully submitted,

6
7
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9 David C. Fathi
10 Daniel Mach
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By: /s/ Margot Mendelson
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs and members of the class they seek to represent² are immigrants incarcerated at the Federal Correctional Institution Victorville Medium II (“FCI Victorville”), a violent and understaffed medium-security federal prison in San Bernardino County.

Since June 2018, as part of its “Zero Tolerance Policy,” the federal government has imprisoned thousands of asylum seekers and other immigrants in five federal prisons in the Western United States, including the FCI Victorville. The consequences of Defendants’ decision to incarcerate immigrants in this federal penitentiary are both predictable and devastating. ICE detainees at the prison live in degrading and punitive conditions. They wear brown and orange jumpsuits and are caged in locked cells for extended periods. They endure strip searching and shackling. They are denied ready access to fresh air and sunlight and to adequate food and nutrition. Even though many of these individuals entered the country to seek asylum, they live day in and day out in harsh prison conditions, with no idea when they will be released or where they will go next.

Many of these individuals are fleeing trauma and violence in their home countries, yet Defendants fail to provide adequate psychological screening or mental health treatment. Defendants also fail to provide detainees with adequate access to medical care, even for urgent medical conditions. Nor do they provide language interpretation when medical encounters do occur. Custody officers routinely retaliate against detainees for seeking medical care and threaten to withhold privileges if detainees request medical attention. As a consequence of these failures, an atmosphere of desperation and fear pervades the prison.

² Plaintiffs filed a Motion for Class Certification on September 4, 2018 (Doc. 34).

1 As if these conditions were not appalling enough, Defendants have deprived
2 detainees of the ability to freely practice their religion—one of the few things that
3 might bring them some sense of comfort or peace of mind. Detainees are denied the
4 right to participate in congregate worship services and group prayer is restricted.
5 They are unable to obtain religious counseling or consult with clergy. Detainees'
6 ability to read and study holy texts, as well as their ability to wear religious headgear
7 and jewelry, are limited by Defendants' confiscation of their personal religious
8 items and refusal to return or replace them in a timely manner, or at all.

9 Plaintiffs will move for expedited discovery in order to fully examine and
10 document the conditions of confinement for ICE detainees at FCI Victorville. Even
11 without benefit of discovery, however, it is evident that these conditions of
12 confinement fall below constitutional minima. Defendants' denial of adequate health
13 care and employment of unnecessarily punitive and harmful custodial practices
14 violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution.
15 Defendants also violate the Free Exercise Clause of the First Amendment and the
16 Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* by restricting and
17 failing to accommodate detainees' religious exercise. Although the named plaintiffs
18 in this action have been transferred out of FCI Victorville since the filing of the
19 complaint, the conditions of confinement imposed by Defendants continue to cause
20 irreparable harm to the class, as well as the subclass, they seek to represent. The
21 balance of hardships tips sharply in the Plaintiffs' favor, and the public has no
22 interest in subjecting immigrants to punitive and degrading conditions of
23 confinement or in denying them the ability to practice their religion.

24 Pursuant to Federal Rule of Civil Procedure 65, the Court should enjoin
25 Defendants from the unlawful and unnecessary policies and practices that threaten
26 the physical, mental, and spiritual well-being of detainees at FCI Victorville. In
27 particular, the Court should enjoin Defendants from providing constitutionally

1 inadequate health care to ICE detainees at FCI Victorville, subjecting ICE detainees
 2 at FCI Victorville to conditions and practices that amount to punishment, restricting
 3 detainees' religious exercise or failing to accommodate detainees' religious exercise
 4 in a manner that violates or is otherwise inconsistent with ICE's Detention
 5 Standards, and transferring any additional ICE detainees to FCI Victorville.

6 II. BACKGROUND

7 A. The Conditions for ICE Detainees at FCI Victorville Are Similar 8 to, or Worse than, Those of Criminal Prisoners

9 Defendants know that prisons are inappropriate facilities for immigration
 10 detainees. In 2009, ICE concluded that "the demeanor of the Immigration Detention
 11 population is distinct from the Criminal Incarceration population." Specifically,
 12 "the majority of the population is motivated by the desire for repatriation or relief,
 13 and exercise exceptional restraint" so that "relatively few file grievances, fights are
 14 infrequent, and assaults on staff are even rarer."³ ICE identified "important
 15 distinctions" between "the administrative purpose" of immigration detention,
 16 "which is to hold, process, and prepare individuals for removal—as compared to the
 17 punitive purpose of the Criminal Incarceration system."⁴ Notwithstanding these
 18 critical distinctions, ICE has elected to incarcerate immigration detainees in a
 19 federal prison, a facility designed to punish the persons incarcerated there.

20 Both in policy and practice, the federal government flouts the distinction
 21 between civil and criminal detention for the ICE detainees at FCI Victorville. The
 22 ICE-BOP Inter-Agency Agreement that governs the incarceration of ICE detainees
 23 at FCI Victorville expressly provides that the detainees will be subject to BOP's
 24 policies for *pretrial criminal inmates*. See Doc. 35-1 at ¶ 4.D.3.a; *see also* Program

25 ³ Dora Schriro, U.S. Department of Homeland Security, *Immigration Detention*
 26 *Overview and Recommendations* at 2, 21 (Oct. 6, 2009).

27 ⁴ *Id.*

1 Statement 7331.04, Federal Bureau of Prisons (hereinafter “BOP PS”), 1 (Jan. 31,
 2 2003).⁵ With respect to medical care, mental health care and discipline, BOP policy
 3 regards ICE detainees as indistinguishable from criminal prisoners at FCI
 4 Victorville. *See id.* at 1, 14, 16.

5 Indeed, ICE detainees at FCI Victorville experience the same custodial
 6 restrictions as criminal prisoners.⁶ ICE detainees, like criminal prisoners, are subject
 7 to unclothed visual inspections. *See, e.g.*, Decl. of Yoni Santiago Gutierrez, attached
 8 hereto as Exhibit 1 at ¶ 3 (“When we arrived . . . [w]e had to take off all of our
 9 clothes and be searched. I also have been strip searched two other times after legal
 10 visits.”); Decl. of Noel Siles, attached hereto as Exhibit 2 at ¶ 4 (“When I first got
 11 here, I was strip searched. I had never exposed myself like that and I felt it was a
 12 huge violation. I was told to hold my hands behind my head and turn around and
 13 show my buttocks to an officer and cough.”).⁷ ICE detainees, like criminal
 14 prisoners, are shackled—sometimes for hours on end—when they are transported to
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17 ⁵ BOP Program Statements are available at
 18 https://www.bop.gov/resources/policy_and_forms.jsp.

19 ⁶ Detainees have been told by prison officers that, although immigration detainees
 20 are not prisoners, they are in prison and have to follow federal prison rules *see Decl.*
 21 of Gabriel Manzanilla Pedron, attached hereto as Exhibit 3, at ¶ 17, and that these
 22 rules are stricter than rules in jails. *See Doc. 1-1 at ¶ 17.*

23 ⁷ *See also Doc. 1-6 at ¶ 7 (“I had to take off all of my clothes in front of an official*
 24 *before I was given a brown jumpsuit.”); Decl. of Desmond Tenghe, attached hereto*
 25 *as Exhibit 4, at ¶ 3 (“We were strip searched when we arrived. It was embarrassing.*
 26 *I have also been strip searched after a legal visit.”); Supp. Decl. of Stephenson*
 27 *Awah Teneng, attached hereto as Exhibit 5, at ¶ 16 (unclothed visual search upon*
arrival at Victorville); Decl. of Alex Armando Villalobos Veliz, attached hereto as
Exhibit 6, at ¶ 5 (same). BOP conducts these searches despite its Pretrial Inmate
policy prohibiting visual searches without reasonable suspicion that an inmate is
concealing a weapon or contraband. See BOP PS 7331.04, 1, 6 (Jan. 31, 2003).

1 or from FCI Victorville.⁸ ICE detainees, like criminal prisoners, are also subjected
 2 to extended lockdowns that restrict them to locked cells for days.⁹ ICE detainees,
 3 like criminal prisoners, are required to stand for inmate count and follow the rules of
 4 the prison.¹⁰ ICE detainees, like criminal prisoners, have severely restricted access
 5 to fresh air and opportunities for socialization.¹¹

6 In many regards, conditions for ICE detainees at FCI Victorville fall well
 7 below the standards that Defendant BOP sets for criminal prisoners. For example,
 8 BOP policies require that criminal prisoners receive adequate nutrition and at least
 9 20 minutes to eat their meals.¹² ICE detainees, by contrast, receive meals that are
 10 small, inadequate, of poor nutritional value, and inedible.¹³ Officers allow less than
 11

12 ⁸ See, e.g., Doc. 1-6 at ¶ 5 (Plaintiff shackled for four to five hours); Exhibit 6
 13 (attached hereto) at ¶ 4 (shackled for five to six hours), Exhibit 4 (attached hereto) at
 14 ¶ 2 (shackled for three hours), Doc. 1-3 at ¶¶ 7-8 (shackled and chained during trip
 to hospital for urgent medical care).

15 ⁹ See, e.g., Doc. 1-5 at ¶ 7 (plaintiff kept in cell for first few days after he arrived in
 16 July); Doc. 1-8 at ¶ 16 (locked down “for about four days without clean clothes or
 17 showers”); Doc. 1-11 at ¶ 3 (constantly locked in cell the first three days after he
 18 arrived); Doc. 1-17 at ¶ 7 (spent the first three or four days locked in his cell). See
 also Exhibit 3 (attached hereto) at ¶ 14; Exhibit 6 (attached hereto) at ¶ 7.

19 ¹⁰ See, e.g., Exhibit 3 (attached hereto) at ¶ 18 (officer informed detainee “that we
 20 are in a prison and we have to follow prison rules”); id. (“I saw a guard threaten to
 hit somebody because he did not get up fast enough at 9:30” for count).

21 ¹¹ See, e.g., Doc. 1-6 at ¶ 14 (plaintiff’s unit locked down for seven hours due to a
 22 fight in another building); Doc. 1-9 at ¶ 6 (extremely limited out of cell time); Doc.
 23 1-10 at ¶ 15 (same); Doc. 1-11 at ¶ 3 (24-hour lockdowns on weekends); Doc. 1-19
 24 at ¶ 12 (same). See also Exhibit 5 (attached hereto) at ¶ 17; Exhibit 6 (attached
 hereto) at ¶ 9.

25 ¹² BOP PS P4700.06, 1, 61 (Sept. 13, 2011) (requiring nutritionally adequate meals
 26 and dining spaces that afford “each inmate the opportunity to have at least 20
 minutes of dining time for each meal”).

27 ¹³ See Doc. 1-8 at ¶¶ 15, 17 (weight loss due to lack of food; often served sour milk);
 28 Doc. 1-9 at ¶ 10 (inadequate amount of food, has seen worms or maggots in the
 (footnote continued)

1 five minutes for the detainees to eat their meals before demanding that they leave
 2 the chow hall and throw away any uneaten food.¹⁴

3 BOP policies also require that all institutions offer various continuing
 4 education, library, parenting, and other programs.¹⁵ No such programs are provided
 5 for ICE detainees, who cannot even access books in languages they understand.¹⁶

6 Similarly, BOP policy requires that criminal prisoners “have access to
 7 regularly scheduled congregate services [and] chaplains” and outlines various other
 8 religious programs, services, and accommodations available to criminal prisoners.¹⁷
 9 However, Defendants have not provided meaningful access to religious worship

10

11 meat); Doc. 1-10 at ¶ 8 (inadequate amount of food, meat in the sandwiches is
 12 sometimes expired); Doc. 1-14 at ¶ 11 (inadequate amount of food); Doc. 1-15 at ¶
 13 21 (inadequate amount of food; sometimes served spoiled milk and sandwiches that
 14 are just two pieces of bread); Doc. 1-20 at ¶ 5 (inadequate amount of food; often
 feels hungry); Doc. 1-4 at ¶ 11 (7 kilograms lost due to inadequate food).

15 ¹⁴ See Doc. 1-6 at ¶¶ 20, 21 (less than 10 minutes to eat; official forced a detainee to
 16 throw away bread he had put in his pocket when leaving the chow hall); Doc. 1-7 at
 17 ¶ 6 (only 5 minutes to eat); Doc. 1-8 at ¶ 15 (only about 5 minutes to eat; not
 18 allowed to take food from the chow hall, even an apple); Doc. 1-10 at ¶ 8 (only 3-5
 minutes to eat); Doc. 1-17 at ¶¶ 12 (3-4 minutes to eat each meal; leftover food is
 confiscated and thrown away); Doc. 1-20 at ¶ 5 (only 5 minutes to eat).

19 ¹⁵ BOP PS 5300.21 (Feb. 18, 2002); *see also* BOP PS P5370.11, 1 (June 25, 2008)
 20 (BOP “encourages inmates to make constructive use of leisure time, and offers
 21 movies, games, sports, social activities, arts and hobbycrafts, wellness, and other
 group and individual activities”).

22 ¹⁶ Doc. 1-2 at ¶ 8 (told by ICE that he could not participate in classes listed on a
 23 paper about the prison); Doc. 1-4 at ¶ 7 (only English books available); Doc. 1-9 at ¶
 24 9 (no programs, education, or training available); Doc. 1-10 at ¶ 7 (no activities,
 25 programs, jobs; books are only in English); Doc. 1-14 at ¶ 14 (books only in English,
 26 no classes or programs); Doc. 1-15 at ¶¶ 14, 19 (no classes, programs, or groups
 available); Doc. 1-17 at ¶ 15 (no known educational, recreational, or other
 programs); Exhibit 5 at ¶ 14 (no access to school or other activities).

27 ¹⁷ BOP PS P5360.09, 1, 1 (Dec. 31, 2004).

28

1 services for detainees, and their ability to engage in informal congregate prayer and
 2 religious study is limited. *See infra* II.D.

3 Finally, BOP policies governing patient care provide that criminal prisoners
 4 receive physical and mental health assessments upon intake. The policies require
 5 that medical staff assess patients when they express pain. They require that patients
 6 have access to a variety of physical and mental health care services and treatments
 7 while incarcerated.¹⁸ In practice, as detailed herein, Defendants routinely deny or
 8 delay the provision of these health care services to ICE detainees at FCI Victorville.

9 Indeed, Defendants confine ICE detainees in conditions far more restrictive
 10 than those to which Defendant BOP subjects convicted criminal prisoners in even its
 11 minimum-security facilities. For example, according to BOP, minimum-security
 12 facilities (also known as federal prison camps) “have dormitory housing, a relatively
 13 low staff-to-inmate ratio, and limited or no perimeter fencing. These institutions are
 14 work- and program-oriented.”¹⁹ Many of the housing units in federal prison camps
 15 provide open access to microwave ovens, clothing irons, hairdryers, curling irons,
 16 and other appliances.²⁰ Some individuals in BOP camps are permitted to possess a
 17 radio or MP3 player,²¹ sleep in residential dorm-like buildings, and access gyms and

18 BOP PS 6031.04, 1, 20 (June 3, 2014) (“patients who complain of pain, will be
 19 assessed and treated if necessary”); *id.* at 5 (listing categories of medical treatment
 20 available); *id.* at 23 (initial assessment to be conducted upon arrival at institution).

21 *About Our Facilities*, Federal Bureau of Prisons, *available at*
https://www.bop.gov/about/facilities/federal_prisons.jsp.

22 *FPC Alderson Inmate Handbook*, Federal Bureau of Prisons, 1, 8 (June 2012),
https://www.bop.gov/locations/institutions/ald/ALD_aohandbook.pdf; *FPC Duluth
 23 Inmate Admissions and Orientation Handbook*, Federal Bureau of Prisons 1, 12
 24 (Feb. 2010), https://www.bop.gov/locations/institutions/dth/DTH_aohandbook.pdf.

25 *FPC Bryan Inmate Admission and Orientation*, Federal Bureau of Prisons, 1, 7
 26 (Jan. 22, 2016), *available at*
https://www.bop.gov/locations/institutions/bry/BRY_aohandbook.pdf.

1 movie theaters.²²

2 By contrast, Defendants confine ICE detainees at FCI Victorville in small,
 3 locked cells. Defendants restrict their freedom of movement, and even keep
 4 detainees locked in their cells on Saturdays and Sundays, while prisoners are
 5 allowed out of their cells on the weekends. *See Exhibit 6* (attached hereto) at ¶¶ 9-
 6 10. Defendants confiscate detainees' personal property and prohibit them from
 7 possessing entertainment devices like televisions and radios to help pass the time.
 8 *See Doc. 1-15* at ¶ 13 (housed alone in small cell), and at ¶14 (no television or radio
 9 in cell); *Exhibit 5* (attached hereto) at ¶ 13 (prisoners are permitted to have MP3
 10 players, but ICE detainees are not). Defendants deny ICE detainees access to
 11 educational and recreational programs and work opportunities.

12 **B. Defendants' Practices and Conditions of Confinement at FCI**
 13 **Victorville Violate ICE's Detention Standards**

14 The government has developed standards for ICE detention that expressly
 15 prohibit many of the practices and conditions of confinement present at FCI
 16 Victorville.²³ ICE's 2008 and 2011 Performance-Based National Detention
 17 Standards ("PBNDS") require, for example: (1) physical and mental health intake
 18 assessments; (2) access to appropriate health care services; (3) provision of adequate
 19 nutrition, and at least 20 minutes to eat meals; and (4) access to religious worship
 20 services, clergy, and various religious items.²⁴ The fact that Defendant ICE

21 ²² Esme Murphy, *Behind Bars: Denny Hecker's Life in Prison*, CBS Minnesota
 22 (May 15, 2011) (describing the Federal Prison Camp in Duluth, Minnesota).

23 ²³ ICE's Performance-Based National Detention Standards ("PBNDS") govern
 24 conditions in eleven immigration detention centers in the Ninth Circuit. *See U.S.*
 25 *Customs and Immigration Enforcement, Facility Inspections: Dedicated and Non-*
 26 *Dedicated Facility List*, <https://www.ice.gov/facility-inspections>.

27 ²⁴ PBNDS 2008 § 4.22(V)(I)(1); PBNDS 2011 § 4.3(II)(14) (intake assessments);
 28 §§ 4.22(II)(15), 4.22(V)(B), (K), (N) & (O); PBNDS 2011 §§ 4.3(II)(2) & (4),
 29 4.3(V)(A), (S) & (T) (health care services); PBNDS 2008 §§ 4.20(II)(1), (3) & (4),
 (footnote continued)

developed and enforces these standards for ICE detainees demonstrates that the deprivations at Victorville are not necessary to achieve a governmental objective.²⁵

C. Defendants Deny Minimally Adequate Health Care to ICE Detainees at FCI Victorville.

In addition to subjecting ICE detainees to harmful and punitive conditions of confinement at FCI Victorville, Defendants fail to provide for detainees' basic medical and mental health needs. The prison lacks adequate health care staff to provide a minimally adequate system of health care for individuals detained there. On August 27, 2018, John Kostelnik, a case manager at FCI Victorville and president of AFGE 3969, which represents BOP employees at FCI Victorville, confirmed that there are just two doctors on staff to serve over 4,000 criminal prisoners and ICE detainees at FCI Victorville, and one of them is largely occupied with administrative tasks. *See* Decl. of Margot Mendelson ("Mendelson Decl."), Exhibit 1, at p. 1, ln. 25, p. 2, ln. 1.²⁶ According to media reports, no additional staff were hired to help attend to the 1,000 detainees that arrived around June 8, and "[m]edical staff have become 'emotional' as they struggle to provide proper care" for Victorville's thousands of charges.²⁷ Mr. Kostelnik's account is consistent with

4.20(V)(D)(1); PBNDS 2011 §§ 4.1(II)(1) & (3), 4.1(V)(D)(1) (adequate nutrition and time to consume meals); §§ 5.30(II)(6), 5.30(V)(G); PBNDS 2011 §§ 5.5(V)(D), (F) & (J). The 2008 and 2011 PBNDS standards are available at <https://www.ice.gov/factsheets/facilities-pbnds>.

²⁵ Plaintiffs do not concede that the ICE standards meet constitutional minima; many are unduly restrictive. Nonetheless, even these excessively restrictive standards provide for less punitive correctional practices and conditions of confinement than those that exist at FCI Victoryville.

²⁶ Accord Lauren Gill, *As Immigrant Detainees Are Moved to Prisons, What Happens to the Prisoners?*, Rolling Stone (July 3, 2018) (documents show that “there are just two physicians, nine physician assistants or nurse practitioners, and one medical clerical worker to care for the roughly 4,200 people” at FCI Victorville).

²⁷ Lauren Weber, *As Health Conditions Worsen at Prison Holding 1,000 (footnote continued)*

1 the U.S. Department of Justice Office of the Inspector General's 2016 investigative
 2 findings, which documented systemic understaffing of medical professionals
 3 throughout the BOP, resulting in limitations on prisoners' access to medical care.²⁸
 4 These deficiencies in medical staffing have led to a dangerous and life-threatening
 5 situation for ICE detainees at the prison, whose health care needs have been ignored.

6 **1. Defendants Fail to Provide Adequate Intake Health
 7 Screening.**

8 Defendants fail to conduct adequate intake health screenings of detainees
 9 when they are admitted to FCI Victorville. There is no consistent screening of
 10 detainees for medical, mental health, or dental problems upon intake. *See Doc. 1-10*
 11 at ¶ 12 (no dental screening despite painful toothache); Doc. 1-15 at ¶ 5 (no medical,
 12 dental, or mental health screening upon arrival). The minimal and inconsistent
 13 screening that does occur often involves no meaningful communication with the
 14 patient, leading to "treatment" without detainees' informed consent. *See Doc. 1-6* at
 15 ¶ 15 ("They didn't tell us what was in the injection"); Doc. 1-2 at ¶ 13 ("screening"
 16 consisted of an injection of unknown contents).

17 Indeed, communication is, in many cases, rendered impossible by
 18 Defendants' failure to provide language interpretation to detainees. For example, a
 19 nurse who examined Plaintiff Ankush Kumar regarding his kidney stones relied on
 20 another Punjabi-speaking detainee who is fluent in English and was compelled to
 21 interpret for other Punjabi speakers during medical encounters. Doc. 1-3 at ¶ 6.

22
 23 *Detainees, Staff Fears A Riot*, Huffington Post (July 2, 2018); Gill, *supra* note
 24 26.

25 ²⁸ U.S. Dep't of Justice, Office of Inspector General, *Review of the Federal Bureau*
 26 *of Prisons' Medical Staffing Challenges*, (March 2016). Plaintiffs have requested
 27 discovery regarding staffing and vacancy levels for custody and health care staff at
 FCI Victorville. *See* Plaintiffs' Motion for Expedited Discovery, filed herewith.
 Plaintiffs will supplement this filing once that discovery is obtained.

1 Plaintiff Ngwa is fluent in English and French, and acted as a translator for French-
 2 speaking detainees. Doc. 1-2 at ¶ 16; *see also* Doc. 1-7 at ¶ 4 (detainee relies on
 3 cellmate to translate to French); Doc. 1-9 at ¶ 16 (another detainee translated when
 4 he saw a nurse regarding stomach pain). Some non-English speaking detainees are
 5 treated without any interpretation at all. *See* Doc. 1-17 at ¶ 8 (received medical
 6 treatment he did not understand; all services rendered in English).

7 These nonexistent or inadequate screenings have predictably had adverse
 8 health effects on the detainee community at large, including outbreaks of
 9 communicable diseases and prolonged quarantines.²⁹ According to Mr. Kostelnik's
 10 August 27, 2018 report, in fact, there have been at least 60 cases of scabies and 30
 11 cases of chickenpox at the prison since the ICE detainees arrived in June 2018. *See*
 12 Exhibit 1 to Mendelson Decl., at p. 2, ln. 5-10.

13 At FCI Victorville, Defendants have relied on a short, written survey
 14 (available only in English and Spanish) for mental health screening. *See* Doc. 1-19
 15 at ¶ 6 (describing questionnaire used in lieu of mental health screening).³⁰ Plaintiff
 16 Granados Aquino was "never . . . asked about [his] mental health in person" after
 17 arriving at FCI Victorville. Doc. 1-6 at ¶ 15. When he first arrived at the prison, he

18
 19 ²⁹ *See Roxana Kopetman, Immigration detainees in Victorville prison get more*
scabies, chicken pox; protesters to gather Saturday, The Orange County Register
 20 (*June 29, 2018*).

21 ³⁰ On August 10, 2018, U.S. District Judge Dolly M. Gee issued an order in the
 22 *Franco-Gonzalez v. Nielsen* litigation finding that the initial mental health
 23 screenings conducted for ICE detainees at some federal prisons, including FCI
 24 Victorville, are "inadequate" and fail to meet the requirements of the injunction and
 25 implementation plan in that case. Order, *Franco-Gonzalez v. Nielsen*, Case No.
 26 2:10-cv-02211-DMG-DTB, Doc. 1008 at 7, 11 (C.D. Cal. Aug. 10, 2018). On
 27 August 17, 2018, the U.S. Department of Justice filed a status report representing
 28 that ICE and BOP would "work together to . . . perform . . . 14-day mental health re-
 screenings" to the 441 ICE detainees at FCI Victorville II by August 31, 2018. *See*
 29 Defendants' Status Report, *Franco-Gonzalez v. Nielsen*, Doc. 1009 at 2.

1 filled out a form, on which he indicated that he was depressed; however, Defendants
 2 never followed up to conduct an assessment or offer him mental health services. *Id.*
 3 at ¶ 16. This is consistent with the experiences of other Plaintiffs and detainees. *See*
 4 Doc. 1-2 at ¶ 15 (“No one has asked me if I feel sad, depressed, or suicide [sic]. I
 5 would tell them [yes] if they did.”); Doc. 1-18 at ¶¶ 4-5, 7 (no screening or ability to
 6 request counseling for anxiety because staff does not speak French); Doc. 1-19 at
 7 ¶ 6 (no face-to-face mental health screening).

8 **2. Defendants Do Not Provide Emergency and Routine Health
 9 Care.**

10 Plaintiffs and other detainees at FCI Victorville have experienced medical
 11 emergencies that go unaddressed and result in gratuitous suffering and a risk of
 12 permanent injury or death. While there is an emergency call button in each cell, calls
 13 from detainees experiencing medical emergencies are often ignored. When he
 14 experienced extreme pain from a kidney stone, for example, Plaintiff Kumar pushed
 15 the emergency call button but was not provided medical attention until the next day,
 16 when he was given medication and ultimately transported to the hospital. Doc. 1-3
 17 at ¶ 5-7. In some cases, detainees have been instructed not to use the emergency call
 18 button to notify staff of their health care needs. Prison staff instructed a detainee that
 19 he “should not touch the call button in [his] cell unless [he is] dying,” Doc. 1-15 at
 20 ¶ 24, and told another detainee never to push the button again. Doc. 1-11 at ¶¶ 7-8.

21 Defendants also lack a reliable system for detainees to access routine health
 22 care. Detainees struggle to communicate their medical care needs to health care
 23 staff. For example, forms to request access to medical services are not routinely
 24 available, and in those cases where forms are provided, they are available only in
 25 English and Spanish. *See* Doc. 1-2 at ¶ 11-12; Doc. 1-4 at ¶ 4; Doc. 1-9 at ¶ 15; Doc.
 26 1-10 at ¶ 11; Doc. 1-11 at ¶ 6. Even those suffering severe and ongoing pain are
 27 unable to convey their needs to medical staff. *See* Doc. 1-10 at ¶¶ 10-13 (detainee
 28 unable to request medical care for his toothache); Doc. 1-20 at ¶ 7 (describing

1 detainee who requested medical care for toothache for eight days “but no one came
 2 to see him”).

3 When detainees do manage to access medical staff, diagnosis and treatment is
 4 often delayed or denied outright. In one case, a detainee who was suffering from a
 5 fever, cough, and sore throat was told by staff that there “weren’t any medical
 6 consultations unless it was really serious, so [he] could not have any help.” Doc. 1-
 7 19 at ¶¶ 7-9. *See also* Doc. 1-2 at ¶ 13 (medical staff screening detainee for chicken
 8 pox “did not want to talk to me about my pain”); Doc. 1-1 at ¶¶ 7-13; and at ¶¶ 19-
 9 21 (no dental treatment or medication for Plaintiff Teneng’s severe toothache
 10 despite complaining to custody and medical staff multiple times over multiple days);
 11 Doc. 1-11 at ¶¶ 7-8 (told to wait until “mañana” for treatment for gastritis); Doc. 1-9
 12 at ¶ 3, and at ¶¶ 13-16 (detainee unable to request medical services or to
 13 communicate with officers about bloody stool, peeling skin, and rashes for weeks);
 14 Doc. 1-18 at ¶ 6 (detainee requested X-ray due to pain in his shoulders, ribs, and leg,
 15 but was not provided an exam.); Doc. 1-8 at ¶ 13 (detainee with nosebleed denied
 16 access to medical staff, and instead told to “deal with it and cut out your bullshit”).

17 **3. Defendants Do Not Provide Minimally Adequate Mental
 18 Health Care.**

19 Defendants fail to provide adequate meaningful mental health treatment, even
 20 when detainees inform Defendants of serious, current mental health needs. Doc. 1-6
 21 at ¶¶ 11, 15-16 (in response to urgent request for mental health treatment, officer
 22 told detainee “I can’t help you right now. Maybe tomorrow.”); Doc. 1-15 at ¶¶ 16,
 23 25 (detainee experiencing depression, loneliness, and desperation; unable to access
 24 mental health services); Doc. 1-18 at ¶ 7 (detainee deeply anxious and unable to
 25 access mental health services). One detainee learned, while in custody at FCI
 26 Victorville, that his father had been killed in Honduras. Exhibit 1 (attached hereto)
 27 at ¶ 5. Upon learning the news, he “yelled and began to cry and lost control.” *Id.* In
 28 response, “some guards started laughing at me” and “put me in a little hallway all

1 alone.” *Id.* at ¶¶ 6-7. After an hour and a half, a psychologist arrived, but she didn’t
 2 speak Spanish and relied on another detainee to translate. *Id.* at ¶ 8. A few days
 3 later, another mental health professional came to see him in the hallway of the
 4 housing unit, “in front of all of my acquaintances.” *Id.* at ¶ 13. She also didn’t speak
 5 Spanish, and relied on another detainee to translate. *Id.* She told the man that “if I
 6 keep asking for the psychologist, they were going to put me in isolation.” *Id.*

7 Defendants’ failure to provide mental health care at the prison is particularly
 8 problematic because the harsh and punitive conditions of confinement can cause
 9 severe psychological distress. Detainees at FCI Victorville report experiencing
 10 mounting depression and hopelessness, which is exacerbated by long periods of
 11 enforced idleness and the denial of adequate opportunities for recreation, activity,
 12 and socialization.³¹ They also report that they hear men weeping in their beds at
 13 night and that they have seen men with fresh scars on their wrists from cutting
 14 themselves.³² Media reports indicate that at least two detainees have attempted
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 17 ³¹ See Doc. 1-2 at ¶ 10 (depression and difficulty sleeping due to enforced idleness);
 18 Doc. 1-6 at ¶ 11 (cried in cell and became depressed due to isolation); Doc. 1-9 at ¶
 19 12 (anxiety due to being locked in cell 20-21 hours a day with nothing to do); Doc.
 20 1-10 at ¶ 10 (“As a result of spending so much time in my cell with nothing to do, I
 21 am frustrated, worry, and get headaches”); Doc. 1-13 at ¶ 3 (“When we first arrived
 22 at Victorville we were in our cells all of the time and it was very hard.”); Doc. 1-15,
 23 at ¶ 16 (“I am having a very difficult time with the isolation and idleness. I feel very
 24 depressed and lonely. At night, I cry.”); Doc. 1-18 at ¶ 3 (anxiety and difficulty
 25 sleeping due to being locked in cell with nothing to do); Exhibit 2 (attached hereto)
 26 at ¶ 5 (depression has worsened due to the conditions; has suicidal thoughts).
 27

³² Doc. 1-8 at ¶ 14 (“I saw an Ecuadorean man who took the blade out of his razor
 24 and cut across his arms and cut a cross into the side of his wrist.”); Doc. 1-15 at ¶¶
 25 17-18 (has heard men crying in their beds at night; has seen men with scars from
 26 cutting themselves due to depression and desperation); Exhibit 5 (attached hereto) at
 27 ¶ 20 (heard a fellow detainee crying in his cell during quarantine); Exhibit 3
 (attached hereto) at ¶ 9 (heard detainees crying, threatening suicide).

1 suicide or been placed on suicide watch.³³ By failing to provide adequate mental
 2 health care, Defendants have placed Plaintiffs and the class they seek to represent at
 3 serious risk of needless psychological harm, injury, and death by suicide.

4 **4. Defendants Do Not Provide Adequate Medication.**

5 Defendants also have failed to ensure that detainees receive necessary
 6 medications. In one case, an asthmatic patient was denied an inhaler or other asthma
 7 medicine upon arrival at FCI Victorville, despite informing staff of his condition.
 8 *See Doc. 1-15 at ¶¶ 3, 5.* He suffered an asthma attack a week later and when he was
 9 finally given an inhaler, it only had 15 doses left. *Id.* at ¶¶ 6-7. Once that inhaler ran
 10 out, the detainee requested another but staff did not provide one. *Id.* at ¶¶ 7-8.

11 Another detainee, whose medication was thrown away by ICE officials when
 12 he was apprehended, notified prison staff of his medical need when he arrived at
 13 FCI Victorville but was denied because he could not remember the name of the
 14 medicine. Doc. 1-8 at ¶¶ 7, 10. Medical staff did not attempt to determine his
 15 diagnosis or provide an alternative medication. *Id.* at ¶ 11. A third detainee who was
 16 seriously injured and hospitalized during his initial apprehension was not given any
 17 pain medication following his initial treatment. *See Doc. 1-20 at ¶ 2.* Nor was he
 18 provided instructions for refilling his gastritis medication. *Id.* at ¶¶ 8-9. The same is
 19 true of another detainee suffering from gastritis, despite making multiple requests.
 20 Doc. 1-7 at ¶¶ 7-12. Another detainee has been unable to obtain medicine for a
 21 serious skin rash, causing his skin to peel. Doc. 1-9 at ¶ 13.

22
 23 ³³ *See Lauren Weber, Detainee Attempts Suicide After Trump Administration*
 24 *Jams Migrants Into Troubled Prison*, Huffington Post (Aug. 1, 2018) (“In the

25 last week, one detainee has tried to kill himself, saying he was terrified he would be
 26 deported back to Cuba. Another was put on suicide watch after staffers noticed he
 27 couldn’t stop crying”). Cf. Weber, *supra* n.27 (Congressman who toured
 Victorville expressing concern that “the sense of hopelessness and depression could
 cause some of them to take their own lives”).

1 **5. Custody Staff Use Threats and Retaliation to Improperly
Interfere with Health Care.**

2 Custody staff at FCI Victorville routinely interfere with detainees' access to
3 health care with conduct that is perceived as retaliatory and has had a chilling effect
4 on detainees' willingness to report alarming symptoms or request health care. For
5 example, Plaintiff Teneng was "locked in his cell for several hours while other
6 detainees were allowed out in response to his asking medical staff to care for his
7 tooth pain." Doc. 1-1 at ¶¶ 13-18. *See* Doc. 1-13 at ¶ 3 (detainee was afraid to ask
8 for medical care because of how custody staff respond to others who request care);
9 Exhibit 3 (attached hereto) at ¶¶ 11-12 (same). Detainees have been intimidated into
10 silence either through explicit threats or verbal abuse. Doc. 1-1 at ¶ 17 (Plaintiff
11 threatened with pepper spray if he continued to complain about his toothache); Doc.
12 1-11 at ¶¶ 7-8 (custody staff response to request for medical care was "don't be a
13 dumbass"); Doc. 1-8 at ¶ 13 (custody staff response to request for medical treatment
14 was "deal with it and cut out your bullshit"); Doc. 1-15 at ¶ 24 (detainee warned he
15 "should not touch the call button in [his] cell unless [he is] dying").³⁴

16 **D. Defendants Have Severely Limited Detainees' Religious Exercise.**

17 FCI Victorville detainees' ability to exercise their religion is severely limited.
18 For example, detainees are not permitted to attend religious worship services that
19 may be held for other prisoners at the facility. *See, e.g.*, Doc. 1-2 at ¶ 9 (Plaintiff
20 reporting no Presbyterian worship services); Doc. 1-7 at ¶ 13 (Catholic); Doc. 1-12
21 at ¶ 7 (Sikh); Doc. 1-14 at ¶ 12 (Hindu); Doc. 1-18 at ¶ 2 (Islamic); Decl. of
22 Dominic Tebit, attached hereto as Exhibit 7, at ¶ 8 (Presbyterian); Exhibit 3 at ¶ 21
23 (Seventh Day Adventist not allowed to attend any religious services); Decl. of Fabio

24
25 ³⁴ The conditions at issue here do not comply with the ICE standards providing that
26 "[b]ecause ICE exercises significant authority when it detains people, ICE must do
27 so in the most humane manner possible with a focus on providing sound conditions
and care." PBNDS 2011 at i.

1 Serrano Solorzano, attached hereto as Exhibit 8, at ¶ 16 (Catholic); *see also* Doc. 1-
 2 9 at ¶ 9; Doc. 1-16 at ¶ 8.

3 Detainees' ability to gather informally outside of their cells to conduct group
 4 prayer or religious study is also limited. *See* Doc. 1-6 at ¶ 23 (officers told Plaintiff
 5 and other detainees that they could not gather in the day room to pray, sing songs,
 6 and preach); Doc. 1-9 at ¶ 9 (officers told detainees who sought to pray in common
 7 area they "did not have the right to assemble or to pray together"); Doc. 1-18 at ¶ 2
 8 (Muslim detainee can only pray in his cell); Exhibit 3 at ¶ 22 (officer broke up
 9 detainees' Bible study and told them it was not allowed"); Exhibit 8 at ¶ 16
 10 (detainees trying to pray and sing hymns told they could not gather as a group).

11 Further, detainees of faith have no ability to consult with clergy or obtain
 12 religious counseling. *See, e.g.*, Doc. 1-2 at ¶ 9 (Presbyterian Plaintiff not able to see
 13 clergy); Doc. 1-7 at ¶ 13 (detainee unable to see a priest since being detained at FCI
 14 Victorville); Exhibit 7 at ¶ 16 (Catholic detainee has no access to pastor or priest).

15 Defendants also have restricted detainees' access to various religious items,
 16 including holy books and other religious texts, religious headwear, and religious
 17 jewelry. For example, Plaintiff Granados Aquino's Bible was seized at the border,
 18 and Defendants denied his request for its return. Doc. 1-6 at ¶ 25. Another
 19 detainee—a Seventh Day Adventist for whom reading the Bible in Spanish is an
 20 "important part" of his religious practice—also had his Spanish-language Bible
 21 confiscated by Defendants, who have refused to return it. Exhibit 3 at ¶ 23. Fifteen
 22 detainees on his unit are forced to share three Bibles. *Id.*; *see* Doc. 1-15 at ¶ 15
 23 (detainee made "multiple requests for a Bible but officers in [his] housing unit said
 24 there are no bibles here"). Similarly, Muslim detainees have no access to the Quran
 25 or other Islamic texts. Doc. 1-18 at ¶ 2.

26 One detainee reported that his rosary was confiscated at the border, and he
 27 has no idea where it is. Doc. 1-20 at ¶ 10. An ICE officer told him it was in
 28

1 Florence; another officer said his property had been lost. *Id.* Sikh detainees' turbans
 2 and karas (religious bracelets) have been confiscated as well. Defendants have not
 3 returned them. *See, e.g.*, Doc. 1-4 at ¶ 9 (Plaintiff Atinder Paul Singh "asked
 4 repeatedly if I could get my turban back, or wear a head covering" but "was told it is
 5 not allowed); Doc. 1-5 at ¶ 6 ("Since I came to Victorville, I have asked for a turban
 6 and my kara but was told they are in my personal property."); Doc. 1-12 at ¶¶ 5, 8
 7 (Sikh turban confiscated, never returned).

8 The prison has purported to make turbans available to purchase via the
 9 commissary. *See* Doc. 1-4 at ¶ 10. However, in practice, many detainees continue to
 10 suffer serious delays in obtaining a turban, if they receive one at all.³⁵ The commissary
 11 is only open on Mondays, and even then, commissary hours are often canceled
 12 without notice. Decl. of Munmeeth Kaur Soni, attached hereto as Exhibit 9, at ¶ 10.
 13 As a result, newly arriving detainees who need turbans are forced to go a week or
 14 more without commissary access. *Id.* Moreover, many detainees cannot afford to
 15 purchase turbans. *See id.* at ¶ 11; Doc 1-4 at ¶ 10.

16 III. ARGUMENT

17 Plaintiffs are entitled to a preliminary injunction prohibiting the
 18 unconstitutional and punitive policies and practices in effect at FCI Victorville
 19 because: (1) Plaintiffs are likely to succeed on the merits; (2) Plaintiffs are likely to
 20 suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in
 21 Plaintiffs' favor, and (4) an injunction is in the public interest. *Winter v. Nat'l Res.*
 22 *Def. Council*, 555 U.S. 7, 20 (2008). Plaintiffs also are entitled to preliminary relief
 23 under the "sliding scale" approach, the Ninth Circuit's "alternate formulation" of the

24
 25³⁵ According to Plaintiff Atinder Paul Singh, an ICE agent told detainees that they
 26 could obtain a "small cover like a patka," a type of turban, if they paid \$10. Doc 1-4
 27 at ¶ 10. But the patka was never received, even though Singh's prison account had
 enough money, thanks to his family in the United States. *Id.*

1 Winter standard. *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012). Under this
2 approach, as long as the Winter factors regarding irreparable harm and public
3 interest are met, courts will issue an injunction where movants raise: (1) “serious
4 questions going to the merits,” and (2) the balance of equities “tips sharply towards
5 the [movants].” *Id.* (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
6 1127, 1135 (9th Cir. 2011))).³⁶

A. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FIFTH AMENDMENT CLAIM REGARDING EXCESSIVELY PUNITIVE CONDITIONS OF CONFINEMENT.

9 Immigration detainees are civil detainees, *Zadvydas v. Davis*, 533 U.S. 678,
10 690 (2001), and “the government’s discretion to incarcerate [them] is always
11 constrained by the requirements of due process.” *Hernandez v. Sessions*, 872 F.3d
12 976, 981, 1000-01 (9th Cir. 2017). The due process clause of the Fifth Amendment
13 prohibits Defendants from confining ICE detainees in conditions that constitute
14 punishment. *Jones v. Blanas*, 393 F.3d 918, 932, 934 (9th Cir. 2004) (“With respect
15 to an individual confined awaiting adjudication under civil process, a presumption
16 of punitive conditions arises where the individual is detained under conditions
17 identical to, similar to, or more restrictive than those under which pretrial criminal

¹⁹ Plaintiffs seek a prohibitory injunction to “prevent future constitutional
20 violations” of the class’s and subclass’s constitutional rights. *Hernandez v. Sessions*,
21 872 F.3d 976, 998 (9th Cir. 2017) (an injunction that “prevents future constitutional
22 violations [is a] a classic form of prohibitory injunction”). Insofar as the relief
23 sought could be characterized as requiring a mandatory injunction, however,
24 Plaintiffs also meet this heightened standard. In the instant case, the merits of the
25 case are not “doubtful,” and the failure to issue an injunction will lead to “extreme
26 or very serious damage” that will not be “capable of compensation in damages.” *Id.*
27 at 999 (citations omitted). As the Ninth Circuit recently held in a lawsuit challenging
immigration detention practices, “unlawful detention certainly constitutes ‘extreme
or very serious’ damage, and that damage is not compensable in damages.” *Id.* at
999. Moreover, as in *Hernandez*, the merits of Plaintiffs’ case “follow[] directly”
from established precedent. *Id.*

1 detainees are held”); *see also Bell v. Wolfish*, 441 U.S. 520, 536 (1979) (for pretrial
 2 criminal detainees, the conditions and restrictions of detention cannot “amount to
 3 punishment”).³⁷ Here, by design and in practice, the conditions of confinement for
 4 ICE detainees at FCI Victorville plainly amount to punishment.

5 Because the conditions for immigration detainees at FCI Victorville are
 6 presumptively unconstitutional, and because it is unlikely that Defendants will rebut
 7 this presumption, Plaintiffs are likely to succeed on the merits of their claim.

8 **1. Incarcerating ICE Detainees at FCI Victorville Is Inherently
 9 Punitive.**

10 Incarcerating ICE detainees at a medium-security federal prison is inherently
 11 punitive. Courts have recognized that the conditions of confinement in prisons are
 12 “designed to punish” criminals. *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982).
 13 At FCI Victorville in particular, the physical plant layout and correctional practices
 14 are designed to confine medium-security criminal prisoners in a manner appropriate
 15 to the heightened security threat they pose, within “strengthened perimeters (often
 16 double fences with electronic detention systems),” locked in “cell-type housing,”
 17 and subjected to heightened “internal controls.”³⁸ By incarcerating ICE detainees at
 18 FCI Victorville, Defendants subject them to a regime of punishment and control
 19 wholly inappropriate for civil detainees.

20 Exposing civil immigration detainees to punitive conditions of confinement is
 21 consistent with Defendants’ broader policy of punishing immigrants who enter the
 22 country in an effort to deter future migrants. Indeed, Defendants have conceded that

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 24 ³⁷ The Fifth Amendment due process clause applies here, but decisions construing
 25 the Fourteenth Amendment are instructive because the due process clauses of the
 26 Fifth and Fourteenth Amendments “are coextensive.” *United States v. Navarro-*
Vargas, 408 F.3d 1184, 1189 (9th Cir. 2005).

27 ³⁸ *About Our Facilities*, *supra* n. 19 (prisons “operated at five different security
 28 levels in order to confine offenders in an appropriate manner.”).

1 they began sending immigrants to FCI Victorville, in part, due to a spike in the
 2 demand for detention space resulting from their so-called “Zero Tolerance Policy”
 3 toward unauthorized border crossings.³⁹ In a recent filing before this court, the
 4 Department of Homeland Security argued that detaining immigrants is justifiable
 5 because it “deters others from unlawfully coming to the United States.” *See* Defs.’
 6 Memorandum Of Points And Authorities In Support Of Ex Parte Application for
 7 Relief from the *Flores* Settlement Agreement, *Flores v. Sessions*, Case No. 2:85-cv-
 8 04544-DMG-AGR, Doc. 425-1 at 13 (C.D. Cal. June 21, 2018) (internal quotations
 9 and citation omitted). In essence, Defendants choose to lock Plaintiffs in a medium-
 10 security federal prison to send a message to foreign nationals that they will face a
 11 similar fate if they seek asylum or cross the border without authorization.

12 Courts have long held that general deterrence is an impermissible justification
 13 for any form of civil detention. *See, e.g., Kansas v. Crane*, 534 U.S. 407, 412 (2002)
 14 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring))
 15 (explaining that civil detention cannot be a ““mechanism for retribution or general
 16 deterrence’ – functions properly those of criminal law”); *accord Hendricks*, 521
 17 U.S. at 373 (“retribution and general deterrence are reserved for the criminal system
 18 alone”). A general-deterrence scheme is particularly objectionable in the
 19 immigration context because “neither those being detained nor those being deterred
 20 are certain wrongdoers, but rather individuals who may have legitimate claims to
 21 asylum in this country.” *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 189 (D.D.C. 2015).

22

23

24

25 ³⁹ *See, e.g., Kate Morrissey, ICE is sending 1,000 immigrant detainees to Victorville*

26 prison, San Diego Union-Tribune (Jun. 7, 2018) (ICE spokesperson said “the
 27 agency needed the extra bed space because of . . . the Department of Justice’s
 recently implemented zero-tolerance policy on illegal crossings”).

28

1 **2. The Conditions at FCI Victorville Are Unconstitutional**
 2 **Because They Are Excessive in Relation to the Government**
 3 **Objective and Because Detainees Are Subjected to Similar,**
 4 **or Worse, Conditions Than Convicted Prisoners.**

5 As civil detainees, Plaintiffs and the class they seek to represent are entitled to
 6 greater protections than post-conviction criminal detainees. *Jones*, 393 F.3d 918,
 7 931-32 (9th Cir. 2004) (“an individual detained awaiting civil commitment
 8 proceedings is entitled to protections at least as great as those afforded to a civilly
 9 committed individual and at least as great as those afforded to an individual accused
 10 but not convicted of a crime”); *see also Castro v. Cnty. of Los Angeles*, 833 F.3d
 11 1060, 1069-70 (9th Cir. 2016) (recognizing distinction between the Eighth
 12 Amendment protections afforded to persons with criminal convictions and the due
 13 process protections afforded to pretrial detainees). Civil detainees are
 14 constitutionally entitled to “more considerate treatment and conditions of
 confinement” than criminal prisoners. *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th
 Cir. 2000).

15 Conditions for civil detainees amount to punishment: “(1) where the
 16 challenged restrictions are expressly intended to punish, or (2) where the challenged
 17 restrictions serve an alternative, non-punitive purpose but are nonetheless ‘excessive
 18 in relation to the alternative purpose’” *Jones, supra*, 393 F.3d at 932 (internal
 19 citations omitted). The court makes an objective assessment whether there is a
 20 reasonable relationship between the government’s conduct and a legitimate purpose.
 21 *Unknown Parties v. Johnson*, 2016 WL 8188563, at *5 (D. Ariz. Nov. 18, 2016),
 22 *aff’d sub nom. Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017).

23 Moreover, if civil detainees are confined under conditions that are “identical
 24 to, similar to, or more restrictive than” those of criminal prisoners, a presumption
 25 arises that the conditions are punitive and thus unconstitutional. *King v. Cnty. of Los*
 26 *Angeles*, 885 F.3d 548, 557 (9th Cir. 2018). A defendant can rebut the presumption
 27 of unconstitutionality by showing “legitimate, non-punitive interests justifying the

1 conditions of [the detainee's] confinement," and that the restrictions imposed are not
 2 "excessive in relation to these interests." *Id.* at 558 (quoting *Jones*, 393 F.3d at 933).
 3 However, "[e]ven if legitimate, non-punitive interests are identified, conditions of
 4 confinement may still be 'excessive' if they are 'employed to achieve objectives that
 5 could be accomplished in so many alternative and less harsh methods.'" *Id.* (internal
 6 citations and quotation marks omitted).

7 The highly restrictive conditions of confinement at FCI Victorville are plainly
 8 excessive in relation to the government's interest. Here, the governmental objective
 9 is to detain immigration detainees pending their removal proceedings.⁴⁰ Defendants
 10 themselves have developed standards that prohibit many of the conditions present at
 11 FCI Victorville, including with respect to physical and mental health screenings,
 12 access to health care, nutrition, and exercise of religion. *See supra* II.A- D.
 13 Defendants have no legitimate governmental interest in conditions that violate their
 14 own minimum standards for conditions of confinement.

15 Moreover, Defendants confine ICE detainees at FCI Victorville in conditions
 16 similar to—and, in many respects worse than—criminal prisoners, and are therefore
 17 presumed to be punitive. *See Jones*, 393 F.3d at 934 ("a presumption of punitiveness
 18 arises" because plaintiff experienced "significant limitations on, or total denials" of
 19 access to recreation, religious services, phone calls, and visitation). As set forth
 20 above, *supra* II.A, ICE detainees are subject to the same BOP policies as criminal
 21 prisoners, including policies covering health care and discipline. Detainees are
 22 subject to many of the same correctional practices as criminal prisoners, such as
 23 extended lockdowns, unclothed visual searches, and shackling during transport.
 24 Detainees are, in fact, treated worse than criminal prisoners with respect to such

25
 26⁴⁰ "Congress has authorized immigration officials to detain some classes of aliens
 27 during the course of certain immigration proceedings." *Jennings v. Rodriguez*, --
 U.S. --, 138 S. Ct. 830, 836 (2018).

1 crucial conditions of confinement as access to health care, nutrition, recreation and
 2 other programs, as well as the ability to exercise their religious beliefs.

3 Indeed, Defendants employ far more restrictive conditions and correctional
 4 practices toward ICE detainees at FCI Victorville than criminal prisoners at BOP
 5 minimum-security facilities. *See supra* II.A. Because the confinement conditions of
 6 ICE detainees at FCI Victorville are similar to, or worse than, the confinement
 7 conditions of criminal prisoners at FCI Victorville and at BOP’s minimum-security
 8 facilities, they are presumptively punitive and unconstitutional.

9 Defendants are unlikely to rebut this presumption. To the extent Defendants
 10 claim that they shackle and strip search ICE detainees, restrict their access to fresh
 11 air and opportunities for socialization, deny them sufficient time to consume their
 12 food, provide them with inadequate mental health care and medical care, and
 13 severely limit their religious exercise in order to ensure their presence at their
 14 removal proceedings, the objective plainly “could be accomplished in so many
 15 alternative and less harsh methods.” *King*, 885 F.3d at 558 (citations omitted).
 16 Defendants must pursue those alternative methods, even if doing so would create
 17 additional financial obligations: “Lack of resources is not a defense to a claim for
 18 prospective relief because prison officials may be compelled to expand the pool of
 19 existing resources in order to remedy continuing . . . [constitutional] violations.”
 20 *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc).

21 **B. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS
 22 OF THEIR FIFTH AMENDMENT CLAIM REGARDING
 23 DENIAL OF ADEQUATE HEALTH CARE.**

24 “There is no question that [ICE] detainees are entitled to ‘adequate medical
 25 care.’” *Doe*, 878 F.3d 710 at 722 (citations omitted). The constitutional standard
 26 governing civil detainees’ entitlement to adequate health care “differs significantly
 27 from the standard for convicted prisoners, who may be subject to punishment that
 28 does not violate the Eighth Amendment’s ban on cruel and unusual punishment.”

1 *Pierce v. Cnty. of Orange*, 526 F.3d 1190 (9th Cir. 2008), *opinion amended and*
 2 *superseded on denial of reh’g*, 519 F.3d 985 (9th Cir. 2008). While a convicted
 3 prisoner must show subjective deliberate indifference to establish a violation of the
 4 Eighth Amendment, the analysis differs for pretrial detainees seeking to establish
 5 that a denial of medical care violates the Fourteenth Amendment.

6 [T]he elements of a pretrial detainee’s medical care claim against an
 7 individual defendant under the due process clause of the Fourteenth
 8 Amendment are: (i) the defendant made an intentional decision with
 9 respect to the conditions under which the plaintiff was confined; (ii)
 10 those conditions put the plaintiff at substantial risk of suffering serious
 11 harm; (iii) the defendant did not take reasonable available measures to
 12 abate that risk, even though a reasonable official in the circumstances
 13 would have appreciated the high degree of risk involved—making the
 14 consequences of the defendant’s conduct obvious; and (iv) by not
 15 taking such measures, the defendant caused the plaintiff’s injuries.

16 *Gordon v. Cnty. Of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018).

17 As detailed above, Plaintiffs are entitled to greater protection than both
 18 convicted prisoners and criminal pretrial detainees. *See Jones*, 393 F.3d at 934;
 19 *King*, 885 F.3d at 557. Accordingly, deprivations of medical care that violate the
 20 rights of convicted prisoners or criminal pretrial detainees *a fortiori* violate the
 21 rights of civil immigration detainees like Plaintiffs. *See Unknown Parties*, 2016 WL
 22 8188563, at *4 (“Conditions of confinement that violate the Eighth Amendment
 23 necessarily violate the Fifth Amendment...”).⁴¹

24 **1. Minimal Requirements of a Prison Health Care System.**

25 In the prison context, the Ninth Circuit has set forth the elements of a
 26 minimally adequate health care system:

27 The Eighth Amendment requires that prison officials provide a system
 28 of ready access to adequate medical care. Prison officials show
 29 deliberate indifference to serious medical needs if prisoners are unable
 30 to make their medical problems known to the medical staff. Access to

31 ⁴¹ Because of the relative dearth of cases involving the health care rights of civil
 32 detainees, this brief relies primarily on cases involving criminal pretrial detainees
 33 and convicted prisoners.

the medical staff has no meaning if the medical staff is not competent to deal with the prisoners' problems. The medical staff must be competent to examine prisoners and diagnose illnesses. It must be able to treat medical problems or to refer prisoners to others who can. ... [T]he prison must provide an adequate system for responding to emergencies. If outside facilities are too remote or too inaccessible to handle emergencies promptly and adequately, then the prison must provide adequate facilities and staff to handle emergencies within the prison. These requirements apply to physical, dental and mental health.

Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982) (citation omitted), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293 (1995); see also *Brown v. Plata*, 563 U.S. 493, 510-11 (2011) ("Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate care, is incompatible with the concept of human dignity and has no place in civilized society.").

"That the Eighth Amendment protects against future harm to inmates is not a novel proposition." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). In an injunctive case, the plaintiff need not show actual physical injury; rather, the Constitution is violated by an unreasonable *risk* of harm. *Id.* at 33, 34 (noting that it "would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them"); see also *Brown*, 563 U.S. at 531-32 ("[A]ll prisoners in California are at risk so long as the State continues to provide inadequate care. . . . [P]risoners who are not sick or mentally ill . . . [are] in no sense [] remote bystanders in California's medical care system. They are that system's next potential victims.").

2. Defendants' Failure to Provide Adequate Intake Health Screening Violates the Constitution.

Defendants' failure to conduct adequate physical and mental health screenings of detainees when they are admitted to FCI Victorville subjects detainees to an unnecessary risk of serious harm. It is well established that correctional institutions must conduct adequate medical and mental health screenings in order to identify individuals' health needs and risk factors. *Plata v. Schwarzenegger*, Case

1 No. C01-1351-TEH, 2005 WL 2932253, at *12 (N.D. Cal. 2005) (“An adequate
 2 intake exam should take fifteen to twenty minutes for a young healthy prisoner and
 3 thirty to forty minutes for prisoners with more complicated health problems.”). By
 4 failing to do so, Defendants violate the Constitution. *See Madrid v. Gomez*, 889 F.
 5 Supp. 1146, 1205 (N.D. Cal. 1995) (citing “grossly inadequate” intake physical
 6 health screenings); *Coleman v. Wilson*, 912 F. Supp. 1282, 1298 n.10 (E.D. Cal.
 7 1995) (obligations include “a systematic program for screening and evaluating
 8 inmates to identify those in need of mental health care” and “a basic program to
 9 identify, treat, and supervise inmates at risk for suicide”). Defendants’ failure to
 10 provide meaningful mental health screenings is particularly reckless in light of the
 11 fact that many ICE detainees are known to be fleeing traumatic and violent
 12 circumstances in their home countries. *See, e.g.*, Exhibit 4 (attached hereto) at ¶ 4
 13 (detainee was locked up and tortured with electrical shocks in his home country);
 14 Doc. 1-6 at ¶¶ 11, 14 (“I got really depressed. [. . .] I began thinking about . . . the
 15 horrible things that had happened to us that caused us to come to the U.S.”).

16 Defendants’ failure to provide adequate medical and mental health screening
 17 reflects the shortage of health care professionals to meet the basic needs of detainees
 18 at FCI Victorville. Courts have held that prison facilities must have adequate
 19 staffing levels to deliver medical and mental health services to prisoners. *Plata*,
 20 2005 WL 2932253, at *5-12; *Madrid*, 889 F.Supp. at 1257. Prison systems also
 21 must ensure that medical care is performed by qualified personnel. *Plata*, 2005 WL
 22 2932253, at *5; *see also Casey v. Lewis*, 834 F.Supp. 1477, 1545 (D. Ariz. 1993).

23 Defendants’ failure to provide adequate health screening to ICE detainees at
 24 FCI Victorville also violates BOP and ICE health care policies. *See* BOP PS
 25 6031.04, 1, 23 (June 3, 2014) (initial screening “will be done within 14 days of
 26 admission”); BOP PS P6340.04 (Jan. 15, 2005); *see also* PBNDS 2011 §§ 4.3 II(14)
 27 (detainees “shall receive a comprehensive medical, dental and mental health intake

1 screening as soon as possible, but no later than 12 hours after arrival at each
 2 detention facility"); II(15) (requiring "comprehensive health assessment, including a
 3 physical examination and mental health screening, by a qualified, licensed health
 4 care professional no later than 14 days after entering into ICE custody or arrival at
 5 facility"); *id.* at §§ 4.3 V(A)(1), (J) (requiring communicable disease screening).

6 **3. Defendants' Failure to Provide Access to Emergency and
 Routine Health Care Violates the Constitution.**

7 Defendants' failure to provide a functional system to respond to the routine
 8 and emergent health care needs of ICE detainees in their custody violates their due
 9 process rights. *See Hoptowit*, 682 F.2d at 1253; *Madrid*, 889 F. Supp. at 1257. As
 10 set forth above, ICE detainees at Victorville report that Defendants do not respond
 11 to their requests for urgent medical attention, and even instruct them not to press the
 12 emergency call buttons in their cells unless they are "dying." Doc. 1-11 at ¶¶ 7-8.
 13

14 Nor do defendants provide a reliable system for detainees to access routine
 15 health care. Detention facilities must "provide a system of ready access to adequate
 16 medical care," *Hoptowit*, 682 F.2d at 1253. Such a system must obviously include a
 17 means for detainees "to make their medical problems known to the medical staff."
Id. At FCI Victorville, however, Plaintiffs report being unable to access medical
 18 attention, even when they are in significant pain and distress.
 19

20 These failures are compounded by Defendants' denial of consistent language
 21 interpretation services during medical encounters for detainees who do not speak
 22 English. *See Anderson v. Cnty. of Kern*, 45 F.3d 1310, 1316-17 (9th Cir. 1995),
opinion amended on denial of reh'g, 75 F.3d 448 (9th Cir. 1995) (affirming
 23 injunction requiring provision of non-detainee translators for medical encounters).
 24 Defendants' inappropriate reliance on other detainees to serve as translators,
 25 including for sensitive medical encounters, violates the Constitution as well as state
 26 and federal health privacy laws and ICE's own detention standards. *See id.*, 45 F.3d
 27 at 1317 ("The testimony was undisputed that inmate translation was inappropriate
 28

1 and potentially inaccurate”); *see also* PBNDS 2011 § 4.3 III (25) (“Medical and
 2 mental health interviews, screenings, appraisals, examinations, procedures and
 3 administration of medication shall be conducted in settings that respect detainees’
 4 privacy”); *id.* § V(E) (“Where appropriate staff interpretation is not available,
 5 facilities will make use of professional interpretation services. Detainees shall not be
 6 used for interpretation services during any medical or mental health service.”).

7 **4. Defendants’ Failure to Provide Adequate Mental Health
 8 Care Violates the Constitution**

9 In a detention setting, “the requirements for mental health care are the same
 10 as those for physical health care needs.” *Doty v. Cnty. of Lassen*, 37 F.3d 540, 546
 11 (9th Cir. 1994). The Constitution requires Defendants to provide “a treatment
 12 program that involves more than segregation and close supervision of mentally ill
 13 inmates” and “employ[] … a sufficient number of trained mental health
 14 professionals.” *Coleman*, 912 F. Supp. at 1298 n.10; *see also Balla v. Idaho State*
Bd. of Corr., 595 F. Supp. 1558, 1577 (D. Idaho 1984) (adequate “treatment requires
 15 the participation of trained mental health professionals, who must be employed in
 16 sufficient numbers to identify and treat in an individualized manner those treatable
 17 inmates suffering from serious mental disorders”) (citation omitted). Defendants’
 18 failure to provide meaningful assessment or treatment of Plaintiffs’ mental health
 19 needs violates their constitutional rights.
 20

21 The failure to provide adequate mental health care also violates ICE and BOP
 22 standards. *See* PBNDS 2011 § 4.3 N(3) (requiring referral when detainee is
 23 exhibiting symptoms of serious mental health issues); BOP PS 5310.16 (May 1,
 24 2014) (BOP should “ensure that inmates with mental illness are identified and
 25 receive treatment”).

26 **5. Defendants’ Failure to Provide Adequate Medication
 27 Violates the Constitution.**

28 Defendants’ failure to provide necessary medications to ICE detainees at FCI

1 Victorville also violates the Constitution. *See Arnett v. Webster*, 658 F.3d 742, 752
 2 (7th Cir. 2011) (failure to provide prescribed medication); *Steele v. Shah*, 87 F.3d
 3 1266, 1269-70 (11th Cir. 1996) (abrupt and unsupported discontinuation of
 4 medications could support finding of Constitutional violation). In addition,
 5 medication regimes must be supervised by qualified health care staff. *See Gates v.*
 6 *Cook*, 376 F.3d 323, 342-43 (5th Cir. 2004) (monitoring and assessment of
 7 psychotropic medication levels required); *Wellman v. Faulkner*, 715 F.2d 269, 272-
 8 73 (7th Cir. 1983) (psychiatrist must supervise psychotropic medication); *Coleman*,
 9 912 F. Supp. at 1309-10 (finding constitutional violation when “defendants’
 10 supervision of the use of medication is completely inadequate; prescriptions are not
 11 timely refilled, there is no adequate system to prevent hoarding of medication, there
 12 is no adequate system to ensure continuity of medication, inmates on psychotropic
 13 medication are not adequately monitored, and it appears that some very useful
 14 medications are not available because there is not enough staff to do necessary post-
 15 medication monitoring”).

16 **6. Custody Staff Violate the Constitution by Using Threats and**
17 Retaliation to Improperly Interfere with Health Care.

18 Custody staff violate the Constitution when they “intentionally deny[] or
 19 delay[] access to medical care or intentionally interfer[e] with the treatment once
 20 prescribed.” *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *see also Plata*, 2005
 21 WL 2932253, at *15 (“custody staff present a determined and persistent
 22 impediment” and have “a common lack of respect” for medical staff); *Madrid*, 889
 23 F. Supp. at 1257-58 (prison officials may not prevent treatment that is medically
 24 necessary in the judgment of the treating doctor); *Casey*, 834 F. Supp. at 1545
 25 (same). By retaliating against Plaintiffs for requesting medical care and demanding
 26 that they do not request medical assistance, custody officers at FCI Victorville have
 27 obstructed Plaintiffs’ access to such care, in violation of the Constitution.

1 **C. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS
OF THEIR RFRA CLAIM.**

2 Under the Religious Freedom Restoration Act (“RFRA”), the government
3 may substantially burden a person’s sincere exercise of religious beliefs *only if* the
4 government can demonstrate that the challenged conduct is the least restrictive
5 means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1(b).
6 RFRA applies this strict scrutiny standard to “all Federal law, and the
7 implementation of that law, whether statutory or otherwise,” and it protects “any
8 exercise of religion, whether or not compelled by, or central to, a system of religious
9 belief.” 42 U.S.C. § 2000cc-5(7).

10 At FCI Victorville, civil immigrant detainees of faith are unable to attend
11 religious services or engage in other congregate worship and are limited in their
12 ability to participate in group prayer and religious study. They have no access to
13 religious counseling and consultation with clergy or a spiritual adviser. And they are
14 restricted in obtaining and possessing religious headwear, jewelry, texts, and other
15 religiously significant items. Subjecting detainees to FCI Victorville’s restrictions,
16 which prevent them from exercising their religious beliefs, violates RFRA.⁴²

17 **1. FCI Victorville’s Limitations on Religious Expression and
Practices Substantially Burden Detainees’ Religious Exercise.**

18 “[G]overnment action places a substantial burden on an individual’s right to
19 free exercise of religion when it tends to coerce the individual to forego her
20 sincerely held religious beliefs or to engage in conduct that violates those beliefs.”
21 *Jones v. Williams*, 791 F.3d 1023, 1033 (9th Cir. 2015) (forcing Muslim prisoner to

23 ⁴² RFRA provides “greater protection for religious exercise than is available under
24 the First Amendment.” *Holt v. Hobbs*, 135 S. Ct. 853, 859-60 (2015). Thus,
25 Plaintiffs need only establish a likelihood of success on their RFRA claim. See
26 *Harbor Missionary Church Corp. v. City of San Buenaventura*, 642 F. App’x 726,
27 728 (9th Cir. 2016). However, Plaintiffs are likely to succeed under the First
Amendment as well because each of the four free-exercise factors considered by the
Ninth Circuit in *Pierce*, 526 F.3d at 1209, weigh in Plaintiffs’ favor.

1 cook pork substantially burdened his religious exercise).⁴³ This coercion can take
 2 various forms, including “an outright ban on a particular religious exercise,” *Greene*
 3 *v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008), indirect pressure that leads
 4 to a change in religious practice, *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th
 5 Cir. 2005), and the imposition of “alternatives [that] require substantial delay,
 6 uncertainty, and expense,” *Nance v. Miser*, 700 F. App’x 629, 632 (9th Cir. 2017)
 7 (internal quotation marks omitted). Defendants’ limitations on detainees’ ability to
 8 exercise their sincerely held religious beliefs are the very sort of restrictions
 9 recognized by courts as substantially burdening people of faith.

10 First, group worship is a core religious practice. *See Cutter v. Wilkinson*, 544
 11 U.S. 709, 720 (2005) (“[T]he ‘exercise of religion’ often involves . . . physical acts
 12 [such as] assembling with others for a worship service[.]”). Accordingly, the Ninth
 13 Circuit has held that barring prisoners from participation in group worship, prayer,
 14 or religious study substantially burdens the exercise of their religion. *See, e.g.*,
 15 *Greene*, 513 F.3d at 988. Yet, despite their own policies providing for group
 16 worship and prayer, *see supra* II.A., Defendants have denied detainees the ability to
 17 exercise their faith in a congregate manner. They prohibit detainees from attending
 18 whatever religious worship services may be provided to the inmate population; they
 19 refuse to provide separate worship services for detainees; and they have restricted
 20 efforts to gather informally for group prayer and worship. *See supra* II.D.

21 Second, detainees have no access to clergy or religious counseling. *See supra*
 22 II.D. Instead, Defendants have left detainees to fend for themselves spiritually at a
 23 time when many of them desperately need religious guidance and comfort. This also
 24 substantially burdens detainees’ religious exercise. *See, e.g.*, *Merrick v. Inmate*

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 26 ⁴³ RFRA and its sister statute, the Religious Land Use and Institutionalized Persons
 27 Act (“RLUIPA”), 42 U.S.C. §§ 2000cc *et seq.*, apply identical legal standards. *Holt*,
 135 S. Ct. at 860. Plaintiffs treat as interchangeable cases applying either statute.

1 *Legal Servs.*, 650 F. App'x 333, 335-36 (9th Cir. 2016) (plaintiff adequately pleaded
 2 that "not allowing him to confess to clergy of his faith by way of unmonitored,
 3 unrecorded phone calls substantially burdened his religious exercise"); *Pierce*, 526
 4 F.3d at 1210 (upholding injunction where evidence did not support defendant's
 5 contention that it provides "opportunities for inmates to participate in religious
 6 services and counseling").

7 Finally, Defendants personal religious items, including religious texts,
 8 headwear, and jewelry, are routinely confiscated by the government. *See supra* II.D.
 9 Defendants refuse to return these items to detainees or provide adequate
 10 replacements. *Id.* Depriving detainees of access to religious texts results in a
 11 substantial burden on their religious exercise. *See, e.g., Harris v. Escamilla*, No. 17-
 12 15230, 2018 WL 2355123, at *1 (9th Cir. May 24, 2018) (officer's desecration of
 13 prisoner's Quran, so that prisoner was unable to read his required ten daily verses,
 14 was a substantial burden on prisoner's religious exercise); *cf. Sutton v. Rasheed*, 323
 15 F.3d 236, 257 (3d Cir. 2003) (noting that a Christian "could [not] practice his faith,"
 16 if "deprived of a Bible"). So too does Defendants' interference with detainees'
 17 ability to wear religious headgear and jewelry.⁴⁴ Defendants have purported to make
 18 turbans available for purchase via the commissary. *See supra* II.D. However,
 19 detainees still face substantial delays and hurdles in obtaining them and suffer
 20 shame and spiritual harm in the meantime. Many detainees, moreover, cannot afford
 21 to purchase turbans from the commissary, no matter the cost.

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 23 ⁴⁴ *See, e.g., Ortiz v. Downey*, 561 F.3d 664, 669-70 (7th Cir. 2009) (prisoner
 24 adequately stated claim showing substantial burden under RLUIPA where he
 25 alleged denial of access to rosary and prayer booklet); *Singh v. Goord*, 520
 26 F.Supp.2d 487, 503 (S.D.N.Y. 2007) (prohibiting Sikh prisoner from wearing his
 27 turban during outside transports and limiting wear of kara to 30 minutes per day
 substantially burdened his exercise of religious beliefs that required him to wear
 both at all times).

1 **2. FCI Victorville's Religious-Exercise Restrictions Are Not the
Least Restrictive Means Available to Defendants.**

2 Because FCI Victorville's restrictions on detainees' religious practices
3 substantially burden their exercise of sincerely held religious beliefs, the burden
4 shifts to Defendants to prove that subjecting Plaintiffs to these policies is the least
5 restrictive means of achieving a compelling governmental interest. *See Gartrell v.*
6 *Ashcroft*, 191 F. Supp. 2d 23, 38 (D.D.C. 2002). Defendants' burden under RFRA is
7 heavy; courts may not give "unquestioning deference" to government officials. *Holt*
8 *v. Hobbs*, 135 S. Ct. 853, 864 (2015). In particular, "the least-restrictive-means
9 standard is exceptionally demanding, and it requires the government to sho[w] that
10 it lacks other means of achieving its desired goal without imposing a substantial
11 burden on the exercise of religion by the objecting part[y]." *Id.* (internal citation and
12 quotation marks omitted). Where a less restrictive means "is available for the
13 Government to achieve its goals, the Government must use it." *Id.* (internal
14 quotation marks omitted).

15 Here, even if Defendants could identify a compelling interest that is furthered
16 by their limitations on detainees' religious exercise, which they cannot, Defendants'
17 own policies make clear that FCI Victorville's practices are not the least restrictive
18 means available to Defendants. Indeed, FCI Victorville, the BOP, and ICE all have
19 policies that explicitly allow prisoners to engage in the religious practices
20 Defendants have obstructed here. Those policies constitute strong evidence that
21 Defendants' religious-practice restrictions violate RFRA.

22 The BOP's Religious Beliefs and Practices Program Statement, for example,
23 provides that (i) "[a]uthorized congregate services will be made available for all
24 inmates weekly"; (ii) religious headwear allowed "throughout the institution"
25 includes, among other items, yarmulkes, Kufis, and turbans; (iii) religious texts,
26 magazines, and periodicals are permitted in accordance with the general rules
27 pertaining to personal property; and (iv) "[i]f requested by an inmate, the chaplain

1 shall facilitate arrangement for pastoral visits by a clergy person or representative of
 2 the inmate's faith.”⁴⁵

3 FCI Victorville’s Inmate Handbook likewise touts the availability of religious
 4 headwear, religious medallions and specialty items, religious literature, and pastoral
 5 care and counseling. *See* FCC Victorville Inmate Handbook (2015) 25-28,
 6 https://www.bop.gov/locations/institutions/she/SHE_fdc_aohandbook.pdf. The
 7 Handbook further states that the prison “provides a variety of worship services,
 8 study groups, and prayer/meditation meetings each week,” as well as “special
 9 activities such as seminars, liturgical meals, fasting periods, holidays, and other
 10 events. *Id.* at 26. Purportedly, “[a]ll residents are welcome to attend any religious
 11 programs without regard to their religion of record.” *Id.* The welcoming picture
 12 painted by the prison’s Inmate Handbook stands in stark contrast to the reality of
 13 detainees’ day-to-day lives.

14 These BOP and FCI Victorville policies set forth less restrictive means that
 15 Defendants easily could employ here. *See, e.g., Ware v. La. Dep’t of Corr.*, 866 F.3d
 16 263, 269 (5th Cir. 2017) (“[I]n the face of evidence of contrary policies, we may not
 17 defer to prison officials’ mere say-so that they could not accommodate [the
 18 plaintiff’s] request because these other policies indicate that a less restrictive means
 19 may be available.”) (internal quotation marks omitted), *cert. denied*, 138 S. Ct. 1181
 20 (2018).

21 Even less restrictive than the BOP’s religion policies are ICE’s Detention
 22 Standards. *See* PBND 2011 § 5.5 at 375 (“Detainees shall have regular
 23 opportunities to participate in practices of their religious faiths, limited only by a
 24 documented threat to the safety of persons involved in such activity itself or
 25 disruption of order in the facility.”). The ICE standards are—in several important

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 27 ⁴⁵ BOP PS P5360.09, at 1, 3-4, 9, 11-15, 16 (Dec. 31, 2004).

1 ways—more solicitous of religious practice than the BOP and Victorville policies.

2 For instance, in recognition of the many different countries and cultures from
 3 which ICE detainees hail, the ICE detention standards affirmatively require officials
 4 to ensure that non-English speakers are able to benefit from religious programs.⁴⁶
 5 Yet those standards have not been implemented at FCI Victorville.⁴⁷ In addition,
 6 although the BOP and ICE authorize the same type of head coverings to be worn,
 7 ICE policy expressly mandates that “[r]eligious headwear and other religious
 8 property shall be handled with respect at all times, including during the in-take
 9 process.” PBNDS 2011 § 5.5 at 375. ICE detention standards also generally allow
 10 detainees to retain their personal religious headwear if it meets the facility’s
 11 standards; where “the detainee’s personal religious headwear does not conform to
 12 the standard, the facility *must ensure* that detainees are provided conforming
 13 religious headwear for free or at a de minimums [sic] cost.” *Id.* (emphasis added).
 14 And ICE detention standards provide that the chaplain “will make documented
 15 efforts to recruit external clergy or religious service providers to provide services to
 16 adherents of faith traditions not directly represented” by chaplaincy staff—an
 17 affirmative obligation not imposed under BOP policy. *Id.*

18 The ICE standards thus represent yet another, less restrictive alternative
 19 available to Defendants. *See Holt*, 135 S. Ct. at 866 (“While not necessarily
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21⁴⁶ *See, e.g.*, PBNDS 2011, at 376 (“Language services *shall* be provided to detainees
 22 who have limited English proficiency to provide them *with meaningful access to*
 23 *religious activities.*”) (emphasis added). *See also id.* at 375-78.

24⁴⁷ BOP policy is markedly less accommodating to the language needs of the detainee
 25 Subclass. Unless the warden authorizes otherwise, “[s]ermons, original oratory
 26 teachings and admonitions must be delivered in English.” BOP PS P5360.09, at 1,
 27 3-4 (Dec. 31, 2004). Moreover, most detainees are not provided any information in
 their native languages, including information about religious programming and
 religious accommodations. *See, e.g.*, Doc. 1-18 at ¶5; Doc. 1-7 at ¶4.

1 controlling, the policies followed at other well-run institutions would be relevant to
 2 a determination of the need for a particular type of restriction.””) (quoting *Procunier*
 3 *v. Martinez*, 416 U.S. 396, 414, n.14 (1974)); *Warsoldier*, 418 F.3d at 1000 (“[T]he
 4 failure of a defendant to explain why another institution with the same compelling
 5 interests was able to accommodate the same religious practices may constitute a
 6 failure to establish that the defendant was using the least restrictive means.”). At a
 7 minimum, then, the Court should order Defendants to apply ICE’s own detention
 8 standards to ICE detainees at FCI Victorville.

9 Finally, nothing requires Defendants to detain immigrants at FCI Victorville.
 10 Victorville officials already have demonstrated that they have no compunction about
 11 denying detainees the ability to engage in basic religious practices, even when doing
 12 so violates BOP (and their own) policies. Ending placement of detainees at
 13 Victorville is yet another less restrictive means available to Defendants, which
 14 would ensure that no detainee is ever again subjected to the prison’s untenable
 15 restrictions on religious exercise. *See Gartrell*, 191 F. Supp. 2d at 39-40 (holding
 16 that BOP’s placement of federal prisoners at Virginia state prisons, where they
 17 could not grow religiously mandated beards, was not the least restrictive means).

18 **D. THE REMAINING PRELIMINARY INJUNCTION FACTORS
 19 WEIGH IN PLAINTIFFS’ FAVOR.**

20 The remaining equitable factors in the preliminary injunction analysis weigh
 21 heavily in Plaintiffs’ favor. First, detainees suffer irreparable harm each day as a
 22 result of the degrading and dangerous conditions of confinement at FCI Victorville.
 23 As the Ninth Circuit recently held, “subpar medical and psychiatric care in ICE
 24 detention facilities” constitute “irreparable harms imposed on anyone subject to
 25 immigration detention.” *Hernandez*, 872 F.3d at 994-95 (quoting *Melendres v.*
 26 *Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)) (holding constitutional violations
 27 sufficient to show irreparable injury, but describing harms “in more concrete
 28 terms”). Moreover, “the deprivation of constitutional rights ‘unquestionably

1 constitutes irreparable injury.”” *Melendres*, 695 F.3d at 1002 (citation omitted),
 2 because these violations “cannot be adequately remedied through damages,” *Am.*
 3 *Trucking Ass’ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1059 (9th Cir. 2009) (internal
 4 quotation and citation omitted).⁴⁸

5 Second, enjoining unconstitutional conditions of confinement at FCI
 6 Victorville, and violations of detainees’ religious-exercise rights is squarely in the
 7 public interest. Indeed, ““it is always in the public interest to prevent the violation of
 8 a party’s constitutional rights.”” *Melendres*, 695 F.3d at 1002 (quoting *Sammartano*
 9 *v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002)).

10 Finally, the balance of hardship tips heavily in Plaintiffs’ favor. Under this
 11 prong of the preliminary injunction analysis, courts “must balance the competing
 12 claims of injury and must consider the effect on each party of the granting or
 13 withholding of the requested relief.” *Winter*, 555 U.S. at 24 (internal quotation
 14 marks omitted). The Ninth Circuit has held that the interest in protecting individuals
 15 from physical harm outweighs monetary costs to government entities. *See Harris v.*
 16 *Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004) (“[F]aced with[] a
 17 conflict between financial concerns and preventable human suffering, [the court has]
 18 little difficulty concluding that the balance of hardships tips decidedly in plaintiffs’
 19 favor.”) (internal quotations omitted). Likewise, the Ninth Circuit has recognized
 20 that, where “plaintiffs have ‘raise[d] serious First Amendment questions,’” it
 21 ““compels a finding that ... the balance of hardships tips sharply in [their] favor.””
 22 *Davies v. Los Angeles Cnty. Bd. of Supervisors*, 177 F. Supp. 3d 1194, 1227 (C.D.
 23 Cal. 2016) (quoting *Sammartano*, 303 F.3d at 973).

24 Here, ICE detainees at FCI Victorville suffer serious risks from Defendants’
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26 ⁴⁸ Defendants’ violation of detainees’ RFRA rights also constitutes irreparable harm.
 27 *See, e.g., Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996).

1 inadequate health care practices and the excessively punitive conditions to which
 2 Defendants subject them. They also suffer the deprivation of one of our most
 3 cherished rights—the right to freely practice one's faith. By contrast, the
 4 “government suffers no harm from an injunction that merely ends unconstitutional
 5 practices and/or ensures that constitutional standards are implemented.” *Doe*, 878
 6 F.3d at 718 (upholding preliminary injunction requiring constitutionally adequate
 7 conditions in ICE temporary detention facilities in Arizona) (citation omitted).⁴⁹

8 **IV. CONCLUSION**

9 For the foregoing reasons, Plaintiffs respectfully request that this Court issue
 10 the Proposed Order for Preliminary Injunction, filed herewith.

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23 ⁴⁹ Plaintiffs seek a waiver of the security requirement for preliminary injunctions.
 24 Fed. R. Civ. P. 65(c). Security “is not required where plaintiffs are indigent or where
 25 considerations of public policy make waiver of a bond appropriate.” *Miller v. Carlson*, 768 F. Supp. 1331, 1340 (N.D. Cal. 1991). Plaintiffs are immigrants,
 26 challenging their conditions of confinement, detained without income, and far from
 27 their families and community resources. See, *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1165 (D. Or. 2018) (“any security in this case would be unjust”).

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Respectfully submitted,

2 By: /s/ Margot Mendelson
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